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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RONALD R. WOLLER

Appeal 2008-1814
Application 10/776,845
Technology Center 3600

Decided: June 27, 2008

Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and
STEVEN D.A. MCCARTHY, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Ronald R. Woller (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-3, 5-9, 11, 13-15, 17, 19, and 20.^{1,2}

¹ Claims 10 and 16 are objected to by the Examiner as being dependent upon a rejected base claim and otherwise indicated as being allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claim. Claims 10 and 16 are not part of the instant appeal.

Claims 4, 12, and 18 have been canceled. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

THE INVENTION

The Appellant's invention is directed towards a climbing tree stand assembly 10 having a platform 11 and a pair of footholds (stirrups) 100, 101 attached to support members 36, 37 (Spec. 3, ¶ 13, Spec. 5, ¶ 20, and fig. 1). Each foothold 100, 101 includes a head portion 104 for attachment to the respective support members 36, 37 and a rigid tail portion 105 having a curved elongate body 122 that extends away from the mounting portion 104 (Spec. 5, ¶ 21 & 22, Spec. 6, ¶ 23, and figs. 1 and 5A).

Claim 1 is representative of the claimed invention and reads as follows:

1. A foot engaging member for use with a climbing tree stand assembly including a platform and a support member attached to the platform, comprising:

a mounting portion for attachment to the climbing tree stand assembly; and

a rigid tail portion having a curved elongate body and extending away from the mounting portion.

² We note that although in the Non-Final Rejection mailed April 6, 2006 claim 20 is rejected under 35 U.S.C. § 112, second paragraph as being indefinite, the rejection was not repeated by the Examiner in the Answer. Therefore, for the purpose of this appeal we shall consider that the rejection of claim 20 under 35 U.S.C. § 112, second paragraph as being indefinite has been withdrawn by the Examiner. Thus, claim 20 also is not involved in this appeal.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Woller US 5,971,104 Oct. 26, 1999
Webster's Dictionary (Tenth Edition) (hereafter "Dictionary")
The Appellant seeks review of the Examiner's rejection of claims 1-3, 5-9, 11, 13-15, 17, and 19 under 35 U.S.C. §102(b) as being anticipated by Woller.

The Examiner provides reasoning in support of the rejections in the Answer (mailed January 17, 2007). The Appellants present opposing arguments in the Appeal Brief (filed October 6, 2006) and the Reply Brief (filed March 15, 2007).

OPINION

Claims 1-3 and 6-7

The Appellant argues these claims together as a group. Thus, in accordance with 37 C.F.R. § 41.37(c)(1)(vii), we have selected claim 1 as the representative claim to decide the appeal with respect to these claims, with claims 2, 3, 6, and 7 standing or falling with claim 1.

Woller discloses a climbing tree stand 20 including a foot-support assembly 26 having a pair of foot straps 96 (stirrups) (col. 3, ll. 63-65; col. 7, ll. 26-28; and fig. 1). The foot straps 96 are attached to the slats 74 to provide a loop configuration which can be adjusted to the size of the user's foot using an adjustment device or threaded fasteners (col. 7, ll. 28-37 and fig. 1). Each strap is made from a nylon web material having a stiffness that "causes the strap to stand up presenting a loop" to the user (col. 7, ll. 42-45).

The issue presented in the appeal of claim 1, and claims 2-3 and 6-7 standing or falling with claim 1, is whether the Appellant has demonstrated that the Examiner erred in determining that the subject matter of claim 1 is anticipated by Woller. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). The Appellant argues that Woller does not "disclose, teach, or suggest foot engaging members that have a rigid tail portion" (App. Br. 6). According to the Appellant, the foot engaging members of Woller are a "pair of stiff, flexible straps, which are not rigid" (App. Br. 6) (underlining in original). Moreover, the Appellant argues that the term "'strap' connotes a flexible member" (Reply Br. 2).

In response, the Examiner uses the Dictionary to show that "the term 'stiff' [i]s synonymous with the term 'rigid'" and that the term "'rigid'...is defined as 'appearing stiff ...' " (Ans. 5). According to our understanding of the Appellant's arguments and the Examiner's response, it appears that the Appellant and the Examiner disagree as to the scope of the term "rigid." When construing claim terminology in the United States Patent and Trademark Office, claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Like the Examiner, we find that the ordinary and customary definition of "stiff" is "rigid" (*Merriam Webster's Collegiate Dictionary* 1155 (Tenth Edition)). We thus agree with the Examiner that the term "stiff" is synonymous with the term "rigid." However, the Appellant points

out on page 8 of the Appeal Brief that the meaning of the term “rigid” is different than the Examiner’s interpretation in that the term means “appearing stiff and unyielding” (underlining in original). As such, according to the Appellant, the Examiner has ignored the second part of the definition (App. Br. 8). In the Appellant’s view the straps of Woller “are somewhat stiff, but they are not unyielding so as to be considered rigid” because the straps “will yield and deform if force is applied to them” (App. Br. 8). In light of the above, the Appellant concludes that in contrast to the straps of Woller the “foot engaging members of the present application are both stiff and unyielding when force is applied, and are thus rigid” (underlining in original) (App. Br. 8-9). The Appellant’s characterization of the present invention in this regard is not entirely supported by the Appellant’s underlying disclosure. We note, for example, that the Appellant describes the head portion 104 and tail portion 105 as being “constructed of a *substantially* rigid material” (Spec. 5, ¶ 21) (emphasis added). The Specification adds that the head portion and tail portion may comprise a molded plastic body or “another durable material, such as metal.” *Id.* Such description suggests that the term “rigid” as used in the specification and the claim may be interpreted broadly enough to encompass the stiff nylon web straps disclosed by Woller.

The USPTO has the initial burden of providing a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic reasonably flows from the teachings of the applied prior art. *See In re King*, 801 F.2d 1324, 1327 (Fed. Cir. 1986). Once the USPTO establishes a *prima facie* case of anticipation based on inherency, the burden shifts to the applicant to prove that the prior art does

not possess the characteristic at issue. *See Id.* In this case, Woller specifically discloses a device or threaded fasteners for adjusting the foot strap (col. 7, ll. 28-33). Further, Woller discloses that the material used to make the foot strap has a certain stiffness which “causes the strap to stand up presenting a loop” to the user (col. 7, ll. 42-45). Woller’s teachings of an adjustment device (col. 7, ll. 31-32) or threaded fasteners (col. 7, ll. 35-36) provides a reasonable basis for us to find that, within the context of a foot strap whose size is adjusted using an additional device, this language would imply to one ordinarily skilled in the art that the foot strap of Woller lacks flexibility and is thus “rigid.” We note that it is the “stiffness” (rigidity) that allows the foot straps of Woller to stand up as a loop and the lack of flexibility that in turn necessitates the addition of a device (e.g. threaded fasteners) for size adjustment. For the above reasons, we conclude that the teachings of Woller reasonably support the Examiner’s determination that Woller’s foot straps are “rigid,” so as to shift the burden to the Appellant to show that this is not the case. The Appellant has not come forward with evidence sufficient to satisfy this burden. Thus, we adopt the Examiner’s finding with regard to the foot strap of Woller being “rigid.”

Finally, the Appellant argues that the term “‘strap’ connotes a flexible member” and as such the foot “straps” of Woller are flexible, not rigid (Reply Br. 2-3). The ordinary and customary definition of “strap” is “any flat, narrow piece, as of metal, used as a fastening” or “any of several straplike parts or things, as a shoulder strap, a loop for pulling on boots, a razor strop, etc.” *Webster’s New World Dictionary* 1407 (David B. Guralnik ed., 2nd Coll. Ed., Simon & Schuster, Inc. 1984). Both definitions appear to be consistent with the manner in which the foot straps of Woller are used.

that is, as a fastening tool (a loop for holding the user's foot), and do not require the strap to be flexible. Furthermore, Woller specifically describes the foot straps 96 as having "stiffness," and does not use the term "flexible" to describe the foot straps. In conclusion, we do not find that the definition of the term "strap" implies necessarily a "flexible member." The Appellant has not provided any objective evidence that a "strap" is necessarily a "flexible member." The arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602 (CCPA 1965).

For the foregoing reasons, the Appellant's arguments do not persuade us the Examiner erred in rejecting claim 1 as being anticipated by Woller. Therefore, the rejection of claim 1, and claims 2-3 and 6-7 standing or falling with claim 1, is sustained.

Claims 8-11 and 14-17

With respect to independent claims 8 and 14, the Appellant argues that Woller does not "disclose, teach, or suggest a climbing tree stand assembly having a pair of rigid footholds" (App. Br. 9; *accord* App. Br. 10) (underlining added). We note that this argument is the same argument the Appellant made with respect to the rejection of independent claim 1, and claims 2-3 and 6-7 standing or falling with claim 1. For the reasons discussed above, the Appellant has not demonstrated any error in the Examiner's rejection of claim 1, and claims 2-3 and 6-7 standing or falling with claim 1, as being anticipated by Woller. Likewise, the Appellant's argument does not persuade us the Examiner erred in rejecting claims 8 and 14 as being anticipated by Woller. Therefore, the rejection is sustained as to these claims as well as dependent claims 9-11 and 13-17, which depend

from claims 8 and 14, respectively, and which have not been argued separately apart from their independent claim.

Claims 5, 13, and 19

Regarding claims 5, 13, and 19, the Appellant argues that in contrast to the claimed invention the foot engaging members of Woller are not constructed of “rigid molded plastics,” but rather constitute a “pair of flexible members” (App. Br. 9, 10, and 11) which do not constitute “molded” bodies (App. Br. 10 and 11). It appears that the Appellant’s argument is twofold in that the foot straps of Woller (1) do not constitute “molded” bodies; and (2) are not “rigid.”

With respect to the Appellant’s first point, Woller specifically discloses foot straps made from synthetic polymers (col. 7, ll. 44-46). One ordinarily skilled in the art would readily appreciate that objects manufactured from synthetic polymers are molded. Therefore, we find that the foot straps of Woller constitute “molded” bodies.

Regarding the Appellant’s second point, it appears that the Appellant is making the same argument presented above, with respect to the rejection of independent claims 1, 8, and 14, that the foot straps of Woller are not “rigid,” but, rather, “flexible.” For the reasons discussed above, the Appellant has not demonstrated any error in the Examiner’s rejection of independent claims 1, 8, and 14, from which claims 5, 13, and 19, respectively, depend. Likewise, the Appellant’s argument does not persuade us the Examiner erred in rejecting claims 5, 13, and 19 as being anticipated by Woller. Therefore, for the reasons discussed above, the rejection of claims 5, 13, and 19 as being anticipated by Woller is sustained.

DECISION

The decision of the Examiner to reject claims 1-3, 5-9, 11, 13-15, 17, and 19 under 35 U.S.C. § 102(b) as anticipated by Woller is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

vsh

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